In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 748

E. MERL YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 38-47) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1954 (R. 48). The petition for a writ of certiorari was filed on May 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the exclusion from the jury lists for the District of Columbia of persons who lived in, but voted outside of, the District, on the ground that such persons were not "residents" of the District, invalidates an indictment returned by a grand jury drawn from such lists.

2. Whether, in view of the fact that it had been brought out during the trial that petitioner had told his story before the grand jury and in view of the fact that the trial court carefully pointed out to the jury the difference between the functions of the grand and petit juries, it was reversible error for the prosecutor to comment in his closing argument before the trial jury that the grand jury had not believed petitioner.

STATUTE AND RULES INVOLVED

Title 11, District of Columbia Code, Section 1417, provides that:

> No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude.

Rule 12(b) of the Federal Rules of Criminal Procedure provides, in relevant part:

> (2) *Defenses and Objections Which Must be Raised.* Defenses and objections based on

defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Rule 92 of the Rules of the District Court for the District of Columbia provides:

> Motions under Rule 12 and 41(e) of the Federal Rules of Criminal Procedure shall be made either before a plea is entered or within ten days after arraignment, unless the Court extends the time either at arraignment or on written application made within the said ten day period. Such application shall set forth the grounds upon which it is made and shall be served on the United States Attorney.

STATEMENT

Petitioner was convicted on four counts of perjury before a committee of the United States Senate and before a grand jury of the District Court

for the District of Columbia and sentenced to a term of four months to two years on each count, the sentences to run concurrently (R. 33). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment was affirmed (R. 48).

The facts, so far as relevant to the issues presented by the petition for certiorari, are as follows:

The indictment of petitioner was returned on February 28, 1952 (R. 2). He was arraigned and pleaded not guilty on March 14, 1952 (R. 2). On April 3, 1952, and later, on May 14, 1952, petitioner filed motions to dismiss the indictment, the grounds of which included a charge that the grand jury was not constituted in accordance with law because the jury commissioners had been improperly selected and because they had not taken the required oath of office. (R. 3, 17). These motions were denied on December 23, 1952 (R. 23). Later, on January 2, 1953, and still some nine weeks before trial, petitioner filed a "Motion for Leave to File Second Supplemental Motion to Dismiss." The motion was based on the contention that the grand jury was illegal and void because the jury commission construed the requirement of the District of Columbia Code that jurors must be residents of the District to exclude all those who voted outside of the District (R. 23-26). The motion was denied (R. 26).

The trial commenced on March 23, 1953, and the verdict was returned on March 31. At the end of

his closing argument to the jury, the prosecutor made the following statement (Tr. 1008):

> The Grand Jury, in conclusion, ladies and gentlemen, they didn't believe him when they said he had nothing to do with these Lustron applications. Of course the indictment means nothing. That is just a charge. It is a means whereby he is brought into court.
>
> But the fact remains that his denial there made no impression on the Grand Jury. I submit to you, ladies and gentlemen, that while they put on quite a lot of ballyhoo here, the simple facts are that this man falsified his testimony in both places, and that he intentionally did so, and that therefore your verdict should be guilty.

Immediate objection was made that this was "highly improper," and a motion for mistrial was made (Tr. 1010). The court did not grant the motion, but opened its charge by explaining to the jury at considerable length the respective functions of the grand and petit jurors (Tr. 1011-1014, see also Tr. 1023), specifically pointing out that an indictment "is not proof, it is not evidence, it can never take the place of proof or evidence and you are so instructed" (Tr. 1013). The jury returned a verdict of guilty on all counts (R. 6).

ARGUMENT

1. Petitioner first contends that the grand jury which indicted him was improperly selected because the jury commission intentionally excluded from the lists of jurors those who voted outside the

District of Columbia. This appears to have been done on the jury commissioner's theory that persons who voted outside the District were not residents of the District within the meaning of section 1417 of the District of Columbia Code requiring jurors to be residents (See R. 40). Petitioner argues that this vitiated the indictment on the same theory that this Court has held invalid indictments returned by grand juries from which Mexicans, women, Negroes, and wage earners have been intentionally excluded. *Hernandez* v. *Texas*, No. 406, O. T. 1953, decided May 3, 1954; *Ballard* v. *United States*, 329 U. S. 187; *Cassell* v. *Texas*, 339 U. S. 282; *Thiel* v. *Southern Pacific Ry.*, 328 U. S. 217.

Those cases are not applicable to the present context. The *Hernandez* case states the basic issue (slip opinion, p. 3):

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. * * *

It is clear that the petitioner here has not met what the *Hernandez* case, *supra*, calls the initial burden, *i.e.*, proof that persons who live in the District of Columbia, but vote outside of it, constitute a separate class distinct from those who live in the District, but do not vote outside of it. Cf. *Hernandez* v. *Texas*, slip opinion, pp. 4-5. Petitioner has not shown that any such separation exists in the District of Columbia, and, we submit, the Court can properly take judicial notice of the fact that it very clearly does not. Stated differently, it is clear that the presence or absence on juries of persons who live in, but vote outside of, the District would make no difference in the character of juries or their deliberations, and this would be so whether or not the matter involved those who voted outside the District.

Moreover, it appears that the basis for the exclusion from the jury rolls of those who voted elsewhere was the belief that such persons were not residents. This was a legal conclusion based upon a statutory qualification for jury service and affected all "nonresidents" alike, regardless of their place in local society. It was not a systematic exclusion based upon distinctions of sex, race, or national origin, or in the social or economic station of those excluded. Nor was there a purpose to exclude voters *qua* voters; rather the exclusion was based upon an erroneous interpretation of the requirement of residence.[1] Consequently, this kind

---

[1] The Court of Appeals pointed out that this erroneous practice has been discontinued (R. 40).

of exclusion has a considerably different purpose and impact from suggestions by jury commissioners that they knew no qualified jurors of a certain group. Cf. *Cassell* v. *Texas*, *supra*.

Thus, the whole basis for striking down indictments returned by grand juries selected by deliberate exclusion of wage earners or women or disadvantaged racial groups is lacking. For those cases involve distinct groups which are in important ways treated differently, usually less favorably, only because they are distinct groups.[2]

Even if it were assumed that there were some merit to petitioner's challenge to the grand jury array, it still would not be so fundamental an error as to justify reversal in a case where, by virtue of the rules of the court, the point was not raised timely. The record shows that although numerous attacks were made on the indictment, and one, indeed, touching the legality of the drawing of the jury lists, the complaint now urged was made in a motion for leave to file a supplemental motion to dismiss filed over nine months after arraignment (R. 2-3). Under Rule 92 of the Rules of the District Court for the District of Columbia, it was wholly discretionary with the court whether it would entertain such a motion at that time. See p. 3, *supra*.

---

[2] As it is clear that the exclusions complained of in *Dow* v. *United States Steel Corp.*, 195 F. 2d 478 (C.A. 3), were of specific groups—foreign born, workers, veterans, and other classes similar to those involved in the Supreme Court cases cited, *supra*, p. 6—there is no basis for saying that *Dow* is in conflict with the decision below.

2. Petitioner also argues that it was reversible error for the prosecutor to comment to the jury in his closing argument that the grand jury did not believe the defendant when he appeared before it. This is said to have violated the rule that the indictment is not proof of the offense, transgressed the presumption of innocence which should continue throughout the trial, attacked improperly the defendant's credibility, and relied on grand jury proceedings which were not in evidence (Pet. 11).

The argument is unsound. It attaches too much weight to the prosecutor's closing statement, which the jury would necessarily accept as partisan. But more important, the court took great pains, in its charge, to point out the respective functions of the petit and grand juries, and specifically made the point that an indictment is not evidence (Tr. 1011-1014, 1023). The court also specifically pointed out that the jury was to bear in mind "that in a proceeding before the Grand Jury the individual in question is not represented by counsel (Tr. 1012)"; that the indictment is returned when the jury "concludes that presumably, probably, a crime may have been committed (Tr. 1013)," and that this is done for the purpose of indicating to the person charged "just exactly the nature and the character of the offense that he will have to interpose his defense against when the time comes to place him upon his trial before a jury of his peers, before a petit jury, before a trial jury such as you are" (Tr. 1013). No exception was taken (as is required by Rule 30 of the Federal Rules of Criminal Pro-

cedure,[3] if the objection is to be preserved), and no request for any additional charge was made; indeed, defense counsel indicated complete satisfaction with the charge (Tr. 1030).

Moreover, an argumuent referring to the grand jury's disbelief was not improper in this case since, unlike the cases on which petitioner relies (*Cooper* v. *United States*, 9 F. 2d 216 (C. A. 8); *United States* v. *Schanerman*, 150 F. 2d 941 (C. A. 2); *Nanfito* v. *United States*, 20 F. 2d 376 (C. A. 8); *Patterson* v. *United States*, 183 F. 2d 687 (C. A. 5)), it was legitimate comment on the evidence in the case. It was in evidence before the trial jury that petitioner had testified before the grand jury and had made the same denials there that he had made before the Senate committee. Much of his grand jury testimony was read in evidence to the trial jury by counsel for the prosecution and the defense (Tr. 770-774, 821-829, 855-857, 879-885, 886-887, 899-906, 981-985). It was thus obvious to the trial jury, from the evidence before them, including the effort of the defense to convince the trial jury that petitioner had made full and frank disclosures to the grand jury (see Tr. 761, 770-774, 788-793, 796-804, 819, 821-827), that the grand jurors did not believe petitioner's denials.

---

[3] Rule 30 provides, in relevant part: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. * * *"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOHN R. WILKINS,
Attorneys.

MAY 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 980233 1981